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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JON A. NORD et al., Plaintiffs and Respondents, v. HOWARD GROBSTEIN, as Trustee in Bankruptcy, etc., Defendant and Appellant.	G052733 (Super. Ct. No. 30-2008-00114401) O P I N I O N

Appeal from postjudgment orders of the Superior Court of Orange County, Franz E. Miller, Judge. Affirmed. Request for judicial notice. Granted.

Landau Gottfried & Berger and Roye Zur for Appellant Howard B. Grobstein, Chapter 7 Bankruptcy Trustee for Defendant Point Center Financial, Inc.

Grant, Genovese & Baratta and David C. Grant; Aires Law Firm and Timothy Carl Aires for Plaintiffs and Respondents.

* * *

In a prior unpublished opinion (*Melvin v Harkey* (July 30, 2018, No. G049674 [nonpub. opn.] (the *Harkey* opinion)), we affirmed the underlying multi-million dollar judgment that a large group of bilked investors (plaintiffs) obtained against Daniel Harkey and his alter ego investment firm, Point Center Financial, Inc. (PCF). We concluded substantial evidence supported the jury's findings Harkey and PCF breached their fiduciary duties and company operating agreements, and committed financial elder abuse, as they lured the unwitting plaintiffs into a classic Ponzi scheme involving a "loan funding" limited liability company known as National Financial Lending LLC (NFL).[1] We also specifically upheld the trial court's findings in bifurcated proceedings that Harkey and PCF were alter egos, and PCF and NFL operated as "a single enterprise" — a particular alter ego characterization with legal consequences not at issue in that prior appeal, but significant here.

While the prior appeal was pending, plaintiffs obtained postjudgment orders in the trial court allowing them to enforce their approximately $12.5 million judgment against NFL, based on the alter ego findings. Plaintiffs sought these enforcement orders after failing to collect from Harkey and a bankrupt PCF. PCF's Chapter 7 bankruptcy trustee, appellant Howard Grobstein (the Trustee), actively competing with plaintiffs for NFL's assets, unsuccessfully opposed plaintiffs' motions for these new enforcement orders.

In this appeal, the Trustee contends we must overturn the enforcement orders against NFL because a judgment can be enforced only against a judgment debtor and NFL is not a judgment debtor. Moreover, the Trustee argues the trial court's alter ego findings do not provide a basis for enforcing the judgment against NFL. We find no

[1] The *Harkey* opinion recounted how PCF ran NFL's day-to-day operations as the limited liability company's managing member, and Harkey, as PCF's sole shareholder, exercised sole control over PCF.

merit to the Trustee's arguments. Consequently, we affirm the enforcement of judgment orders challenged here.[2]

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Trial*

In November 2008, plaintiff John A. Nord and dozens of other bilked investors filed the underlying action against defendants Harkey, PCF, and NFL to recover the money they lost "investing" in what turned out to be an elaborate Ponzi scheme run by Harkey, utilizing PCF and NFL. In November 2010, plaintiffs voluntarily dismissed NFL from the action without prejudice.

The trial court bifurcated the trial into four phases according to different issues alleged. Phase I involved monetary claims that plaintiffs tried before a jury in April and May 2013, followed by a bench trial on their equitable claims, including alter ego. The jury returned a special verdict against Harkey and PCF, awarding plaintiffs more than $12.5 million in compensatory and punitive damages for breach of contract, breach of fiduciary duty, and financial elder abuse.

Before the bench trial began, Harkey and PCF filed a motion for nonsuit arguing the trial court should dismiss "the alter ego theory against Harkey," reasoning that specific theory did not appear in the operative third amended complaint (the complaint). In an extremely narrow reading of the complaint, defendants argued the

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[2] The Trustee filed a motion for judicial notice of certain bankruptcy court filings offered in support of his reply brief. The motion for judicial notice is granted. Plaintiffs filed a motion to augment the record on appeal with several reporter's transcripts from the trial. The motion to augment is granted.

pleading alleged only that *PCF* is *Harkey's* alter ego, not that *Harkey* is *PCF's* alter ego.[3] In effect, the defendants contended the wording of the complaint limited plaintiffs to pursuing a theory of alter ego liability flowing in only one direction: to wit, that *PCF* was liable for Harkey's alleged malfeasance, but not the reverse. This distinction was significant because elsewhere in the nonsuit motion defendants argued Harkey had no personal liability: "It is undisputed that Harkey performed any and all acts at issue in this case through PCF. Therefore, Harkey has the protection of PCF, as a corporate entity, to shield him from personal liability. [Citation.]"

Harkey and PCF also urged the trial court not to allow plaintiffs to amend the complaint to conform to proof. Defendants contended allowing plaintiffs to allege Harkey is PCF's alter ego would cause Harkey significant prejudice by exposing him "to personal liability for tens of millions of dollars[.]"

Unmoved by this argument, the trial court granted plaintiffs leave to amend the complaint to conform to proof. Among the allowed amendments was a revised paragraph 135 that newly alleged an alter ego relationship among Harkey, PCF, and NFL.[4]

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[3] Here is the specific allegation then at issue: "On information and belief there exists a unity of interest and ownership as between Defendant Harkey, as President and principal shareholder of Defendant Point Center, that individuality and separateness among said Defendants has ceased and that *Point Center is the alter ego of Harkey*. . . ." (Italics added.)

[4] As amended, paragraph 135 of the third amended complaint stated: "On information and belief the NFL was and is an entity from the get [go] under the control and dominance of Point Center and Harkey; there exists a unity of interest and ownership as between Defendant Harkey . . . as President and sole shareholder and controller of Defendant Point Center that individuality and separateness among said Defendants and nonparty NFL has ceased and that Harkey is the alter ego of Point Center, and Harkey and Point Center are the alter egos of NFL. Adherence to the fiction of the separate existence of the companies Point Center and NFL as distinct from each other and from Harkey would sanction fraud and promote injustice in that the controlling manager of NFL and the sole controlling shareholder would wrongfully attempt to evade their lawful obligations."

B. *The Alter Ego Findings and Judgment*

At the conclusion of the bench trial, the trial court stated its findings on the alter ego issues. The court began with its finding that "Mr. Dan Harkey[] is the alter ego of Point Center. The Court makes that finding based upon, one, the treatment of the corporate assets as individual assets of Mr. Harkey." The court went on to list a number of other factors relevant to alter ego, such as Harkey's and PCF's use of the same "business location and the same employees," the fact PCF was undercapitalized, and that Harkey "was the sole shareholder of Point Center."

Then the trial court stated its findings as to the relationship between PCF and NFL. "I find that Point Center is also the alter ego of N.F.L. Basically, the same individuals worked for N.F.L. and Point Center. It's the same staff. They worked out of the same office location. They're involved in essentially a single enterprise between N.F.L. and P.C.[F.] as to the function that N.F.L. was to perform, which was investment in trust deeds. And that, essentially, was controlled by Point Center."

On November 11, 2013, after resolving the other phases of the case, the trial court entered the approximately $12.5 million judgment against Harkey and PCF. The judgment included the following "Ruling Regarding Alter Ego": "That Dan J. Harkey, aka Danny J. Harkey, is the 'alter ego' of Point Center Financial, Inc. and jointly and severally liable for all of the damages awarded against Point Center Financial, Inc. in this trial, and that Point Center Financial, Inc. is the alter ego of National Financial Lending, LLC (NFL)."

Harkey appealed from the judgment only as to the Phase I claims. PCF initially appealed as well, but its counsel appointed by the Trustee declined to pursue its appeal, which we therefore dismissed.

C. *Plaintiffs' Motions to Enforce the Judgment Against NFL*

For a year after entry of the judgment, and while Harkey's appeal was pending, plaintiffs attempted to enforce the judgment against Harkey, with little success.

Nor did plaintiffs have any realistic expectation of collecting against the bankrupt PCF, which by then was in Chapter 7 liquidation.

At the end of December 2014, plaintiffs began trying to collect the judgment against NFL, individually and collectively filing motions for charging orders and assignment orders against that entity. (Code Civ. Proc., §§ 708.310, 708.510, respectively; all further statutory references are to Code Civ. Proc. unless otherwise indicated.) For example, plaintiffs collectively filed a motion for an order charging the interest of "Defendant/Judgment Debtor" NFL in 10 specified limited liability companies "with the unsatisfied portion of the judgments entered in this action in favor of Plaintiffs/Judgment Creditors . . . ."

In another example, plaintiff Jon A. Nord filed a motion for an order assigning to him, individually and as trustee of the Nord Family Trust, NFL's interest "in its rights to payment of money due or to become due, whether styled [as] accounts receivable, . . . fees, commissions, or otherwise, from its business activities involving" 39 limited liability companies "to the extent necessary to satisfy the judgment . . . ."

On August 12, 2015, a trial judge newly assigned to handle postjudgment matters heard five of these motions to enforce the judgment against NFL. Plaintiffs argued NFL was jointly and severally liable for the judgment because it was the alter ego of judgment debtors Harkey and PCF. The Trustee, acting to protect the bankrupt PCF's ability to recover on its own claims against NFL, opposed the enforcement orders. The Trustee argued NFL could not be subject to liability under the judgment because it had been dismissed from the action and was not a judgment debtor. The Trustee asserted the trial court's alter ego finding as to NFL was not intended to make NFL jointly and severally liable on the judgment, but only to increase Harkey's and PCF's liability. The Trustee also contended enforcement of the judgment against NFL would violate the California rule against "outside reverse piercing," citing *Postal Instant Press, Inc. v. Kaswa Corp.* (2008) 162 Cal.App.4th 1510 (*PIP v. Kaswa*). Plaintiffs refuted the latter

argument with the assertion the trial court had applied the "single enterprise" rule of alter ego liability, and thus no "reverse piercing" was at issue.

At the conclusion of the hearing, the trial court granted the five motions for charging and assignment orders against NFL, but stayed these enforcement orders for 45 days. The Trustee timely filed the instant appeal from the five enforcement orders entered against NFL.

On July 30, 2018, we filed the *Harkey* opinion affirming the $12.5 million judgment against Harkey and PCF. Harkey appealed on various grounds, including a challenge to the sufficiency of the evidence supporting the alter ego findings. We concluded Harkey forfeited his challenge to the sufficiency of the alter ego evidence because he recounted only evidence favorable to his position. (*Harkey* opinion, p. 16.) Nonetheless, we noted that "ample evidence supported the court's findings. [Citations.]" (*Ibid.*)

II

DISCUSSION

The Trustee contends we must overturn the five judgment enforcement orders because there is no legal basis for enforcing the judgment against NFL. The Trustee argues a judgment can be enforced only against a judgment debtor, and NFL "is not named as a judgment debtor." The Trustee further asserts the trial court lacked jurisdiction to enter judgment against NFL because NFL was a nonparty, having been dismissed from the action before trial. Finally, the Trustee contends the alter ego findings provide no basis for enforcing the judgment against NFL.

There are three strands to the Trustee's alter ego argument. First, the Trustee argues neither plaintiffs nor the trial court intended for NFL to be liable on the judgment based on alter ego; instead, the Trustee contends, alter ego was simply a means for imposing additional liability on Harkey and PCF, as evidenced by the fact the judgment states that Harkey is "jointly and severally liable for all damages awarded

against" PCF, but *omits* "parallel language with respect to" NFL. Second, the Trustee contends imposing liability on NFL based on alter ego would constitute the sort of "reverse piercing" prohibited by *PIP v. Kaswa*, *supra*, 162 Cal.App.4th 1510. Third, the Trustee asserts the trial court failed to comply with the mandatory procedure under section 187 for adding a non-party judgment debtor to an existing judgment on an alter ego theory.

In response, plaintiffs argue the trial court had jurisdiction to enter judgment against NFL because it made a "general appearance" by joining Harkey and PCF in arguing for nonsuit and opposing the motion to amend the complaint to conform to proof. Plaintiffs also assert various grounds for dismissing the appeal, such as the Trustee's purported lack of standing and failure to provide an adequate record.[5] We need not address these issues, however, because one simple fact is enough to dispose of the Trustee's challenge to the judgment enforcement orders: the *Harkey* opinion affirmed the judgment and, with it, the trial court's specific finding that PCF and NFL were alter egos operating as a "single enterprise."

As we explain below, the trial court's "single enterprise" finding has dispositive consequences for this appeal. An alter ego finding based on the "single enterprise" theory imposes liability between "sister companies," effectively recognizing the sister companies as a *single* entity "'endowed . . . with the assets of both, and charged . . . with the liabilities of one or both.' [Citation.]" (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1249-1250 (*Las Palmas*).) In other words, an alter ego finding based on the "single enterprise" theory makes both sister companies liable on the judgment.

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[5] Plaintiffs also include in their brief a request for sanctions against the Trustee for filing a frivolous appeal. The request is procedurally defective. (See Cal. Rules of Court, rule 8.276 [separate motion with supporting declaration required].) We deny the sanctions request.

Under res judicata principles, the Trustee, who stands in the shoes of PCF, is bound by the trial court finding that PCF and NFL were a "single enterprise." (*People v. Carter* (2005) 36 Cal.4th 1215, 1240 [collateral estoppel bars a party or one who was in privity with a party in a prior proceeding from relitigating an issue decided at that previous proceeding]; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 811 ["A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties"].) Because the Trustee is bound by the "single enterprise" finding, he cannot relitigate the issue of NFL's alter ego liability. Consequently, the trial court's "single enterprise" finding moots all of the Trustee's many arguments contesting NFL's liability on the judgment.[6]

1. *Alter Ego and "Single Enterprise" Liability*

A well known set of circumstances brings the equitable doctrine of alter ego into play. "Ordinarily a corporation is considered a separate legal entity, distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. [Citation.] . . . [¶] That legal separation may be disregarded by the courts 'when [a corporation or LLC] is used [by one or more individuals] to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose.' [Citations.] In those situations, the corporation's or LLC's actions will be deemed 'to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. [Citations.]' [Citation.]" (*Curci Investments, LLC v. Baldwin* (2017) 14 Cal.App.5th 214, 220-221 (*Curci*).)

The essence of the alter ego doctrine "'is that justice be done.' [Citation.] Before the alter ego doctrine will be invoked in California, two conditions generally must be met. [¶] 'First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and

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[6] Following oral argument, we invited and received supplemental letter briefs on this res judicata analysis because the parties did not address it in the original briefs.

the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone.' [Citation.]" (*Curci*, *supra*, 14 Cal.App.5th at p. 221.)

"'Usually, a disregard of the corporate entity is sought in order to fasten liability upon *individual stockholders* . . . .' [Citation.]" (*Las Palmas, supra,* 235 Cal.App.3d at p. 1249, italics added.) "A court may also disregard the corporate form in order to hold one corporation liable for the debts of another affiliated corporation when the latter '"'is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit, or adjunct of another corporation.'"' [Citations.] (*Las Palmas, supra,* 235 Cal.App.3d at p. 1249.)" (*Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc*. (2013) 217 Cal.App.4th 1096, 1107.) Under these circumstances, "the affiliated corporations may be deemed to be a *single business enterprise,* and the corporate veil pierced." (*Ibid.*, italics added.)

"[U]nder the single-enterprise rule, liability can be found between sister companies. . . . '"In effect what happens is that the court, for sufficient reason, has determined that though there are two or more personalities, there is but one enterprise; and that this enterprise has been so handled that it should respond, as a whole, for the debts of certain component elements of it. The court thus has constructed for purposes of imposing liability an entity unknown to any secretary of state comprising assets and liabilities of two or more legal personalities; endowed that entity with the assets of both, and charged it with the liabilities of one or both."' [Citations.]" (*Las Palmas*, *supra*, 235 Cal.App.3d at pp. 1249-1250.)

In *Las Palmas*, *supra*, 235 Cal.App.3d 1220 the court affirmed a postjudgment order adding a sister corporation as a judgment debtor based on the trial court finding, supported by substantial evidence, that the two corporate entities "formed a single enterprise for the purpose of committing a continuing fraud against [the plaintiffs]." (*Id.* at p. 1250.)

In the *Harkey* opinion, we affirmed the judgment, likewise concluding substantial evidence supported the trial court's finding that Harkey, PCF, and NFL were alter egos, and PCF and NFL were, in the words of the trial judge, "involved in essentially a single enterprise[.]" (*Harkey* opinion, pp. 15-16.)

2. *The Trustee's Argument Concerning "Outside Reverse Piercing"*

In the reply brief, the Trustee disputes plaintiffs' assertion that the trial court "found PCF and [NFL] jointly and severally liable under the 'single enterprise rule,' . . . the Judgments do not reflect any such finding. Indeed, the Judgments do not even mention the words 'single enterprise.'" The Trustee argues, "The single enterprise rule could not have applied to PCF and [NFL] because the two were not sister companies. Rather, PCF was a member-manager of [NFL]. Because the relationship between PCF and [NFL] was analogous to a parent and subsidiary, the proper theory of liability would have been traditional alter ego, not single enterprise."

Viewing the alter ego relationship between PCF and NFL as "traditional alter ego" rather than "single enterprise alter ego" brings into focus case law concerning "'outside' reverse piercing of the corporate veil[.]" (*PIP v. Kaswa, supra,* 162 Cal.App.4th at p. 1513.) "Under the standard alter ego doctrine, in appropriate circumstances the corporate form may be disregarded and the corporate veil pierced so that an individual shareholder may be held personally liable for claims against the corporation. Some courts have recognized a variant of the alter ego doctrine, called . . . 'outside' reverse piercing of the corporate veil, by which the corporate veil is pierced to permit a third party creditor to reach corporate assets to satisfy claims against an individual shareholder." (*Ibid.*)

In *PIP v. Kaswa, supra,* another panel of this court criticized outside reverse piercing as "a radical and problematic change in standard alter ego law." (*PIP v. Kaswa, supra,* 162 Cal.App.4th at p. 1521.) "Traditional piercing of the corporate veil is justified as an equitable remedy when the shareholders have abused the corporate form to

evade individual liability, circumvent a statute, or accomplish a wrongful purpose. [Citations.] [¶] The same abuse of the corporate form does not exist when the judgment debtor is the shareholder. In that situation, the corporate form is not being used to evade a shareholder's personal liability, because the shareholder did not incur the debt through the corporate guise and misuse that guise to escape personal liability for the debt." (*Id.*, at p. 1522.)

Reasoning that sufficient legal remedies exist "to protect the judgment creditor from the shareholder's fraudulent transfer of assets to the corporation" (e.g., conversion and fraudulent conveyance), the *PIP v. Kaswa* court rejected "[o]utside reverse piercing, accomplished by the expedient means of a postjudgment motion," finding it "an unacceptable shortcut to pursue those remedies." (*PIP v. Kaswa, supra,* 162 Cal.App.4th at p. 1523.) The court held "a third party creditor may not pierce the corporate veil to reach corporate assets to satisfy a shareholder's personal liability." (*Id.* at p. 1512-1513.)

In the present case, the Trustee argues plaintiffs' motions for orders to enforce the judgment against NFL, a "nonparty" and "nonjudgment debtor," are an impermissible form of "outside reverse piercing" prohibited by the *PIP v. Kaswa* decision. The argument, however, is premised on the incorrect assumption PCF and NFL had a "traditional alter ego" relationship rather than a "single enterprise" relationship. The concept of "outside reverse piercing" simply does not apply in the context of a "single enterprise" where liability is "found between sister companies[.]" (*Las Palmas, supra,* 235 Cal.App.3d at p. 1249.) The trial court here specifically found PCF was the alter ego of NFL and the two entities operated as a "single enterprise." Consequently, the rule against "outside reverse piercing" is no bar to the plaintiffs' enforcement of the judgment against NFL.

3. *Res Judicata Renders This Appeal Moot*

As explained above, the Trustee, as PCF's successor in interest, is bound by the trial court finding that PCF and NFL were alter egos involved in a "single enterprise," making them equally liable on the judgment. Because the judgment is final, the doctrine of res judicata bars the Trustee from challenging any aspect of the judgment, including NFL's liability under it. (*People v. Carter*, *supra*, 36 Cal.4th at p. 1240 [collateral estoppel bars a party or one who was in privity with a party in a prior proceeding from relitigating an issue decided in that previous proceeding.) Consequently, all of the Trustee's arguments on appeal challenging plaintiffs' right to enforce the judgment against NFL are moot.

The Trustee contests the application of res judicata here, arguing the trial court's "single enterprise" finding has no preclusive effect because, in fact, it was not a "finding" at all. Instead, according to the Trustee, the trial judge "made one passing reference to the phrase 'single enterprise' in his pre-judgment oral comments from the bench, [and] this passing reference does not constitute a formal finding that PCF and NFL are a 'single enterprise' or that the two entities are alter egos of each other." Moreover, the Trustee contends, "those oral comments" were "superseded by the written Judgments" which "do not state that PCF and NFL were alter egos or that they operated as a 'single enterprise.'"

The first error in the Trustee's argument is the assertion the judgment does not state PCF and NFL were alter egos. It plainly does.[7] The more fundamental flaw in the Trustee's argument lies in its disregard for the appellate decision that affirmed the judgment. The *Harkey* opinion contains the following statement: "In bifurcated proceedings before the trial court, the court found PCF, Harkey, and NFL constituted a

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[7] The "Ruling Regarding Alter Ego" included in the judgment states: "Point Center Financial, Inc. is the alter ego of National Financial Lending, LLC (NFL)."

single enterprise." (*Harkey* opinion, p. 6.) Furthermore, in its discussion of the "specific findings" and "express reasons" underlying the trial court's alter ego ruling, the *Harkey* opinion cites the trial court's statement at the conclusion of the bench trial: "I find that Point Center is also the alter ego of N.F.L. . . . They're involved in essentially a single enterprise[.]" (*Id.* at pp. 15-16.)

The trial court's language confirms "single enterprise" was a "finding," not the mere "passing reference" the Trustee suggests. Moreover, the *Harkey* opinion explicitly recognized the trial court "found" NFL was part of the single enterprise that damaged plaintiffs to the tune of $12.5 million. The Trustee, having abandoned PCF's appeal from the judgment, is unable to contest such findings now.

III

DISPOSITION

The postjudgment orders to enforce the judgment against NFL are affirmed. Respondents are entitled to costs on appeal.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.